IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 68

JAMES FRANCIS HILL,

Petitioner,

vs.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

SUBJECT INDEX

Table of Cases and Other Authorities

CASES:

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Opinions Below

The opinion of the Court of Appeals (R. 45) is reported at 282 F.2d 352 (6th Cir. 1960). The memorandum and order of the District Court (R. 41-44) are reported at 186 F. Supp. 441 (E.D. Tenn. 1959).

Jurisdiction

The judgment of the Court of Appeals was entered on June 14, 1960 (R. 45). The petition was filed June 30, 1960, and was granted March 20, 1961. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

Question Presented

Where the District Court, at the time of imposing sentence upon petitioner, failed to follow the mandatory procedure of Rule 32(a) of the Federal Rules of Criminal Procedure, in that the Court did not afford an opportunity to petitioner, or to his counsel, to make a statement in his own behalf or to present any information in mitigation of punishment, is petitioner entitled to relief in the proceeding he has now brought?

Rules and Statute Involved

Rule 32(a) of the Federal Rules of Criminal Procedure provides:

> (a). Sentence. Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.

Rule 35 of the Federal Rules of Criminal Procedure provides in pertinent part:

> The court may correct an illegal sentence at any time.

Section 2255 of the Judicial Code, 28 U.S.C. §2255, provides:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdic-

tion to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained

if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Statement

Petitioner seeks relief from an illegal sentence imposed by the United States District Court for the Eastern District of Tennessee on June 4, 1954, under separate indictments for transporting a stolen motor vehicle in interstate commerce and for transporting across State lines a person who had been kidnapped and held for ransom. Consecutive sentences of 20 years for the kidnapping offense and of 3 years for the motor vehicle offense were imposed (R. 20). There was no appeal.[1]

Petitioner filed a "Motion to Vacate Sentences Under Section 2255, Title 28 U.S.C." on October 21, 1959, in the

[1] The lack of appellate review of the convictions and sentence has itself been the basis of repeated attempts at post-conviction relief by petitioner. In a motion to vacate and set aside sentence under §2255, filed December 17, 1957, petitioner contended that he was prevented by government agents from appealing his original conviction. In the present proceeding, this contention was renewed together with an allegation that petitioner had in fact sent a letter from prison which was in effect a notice of appeal. The limited grant of certiorari eliminated this question from the present proceeding. At the original trial, petitioner was represented by court-appointed counsel (Document 20 of unprinted record; see note 3 *infra*), who filed and argued a motion for new trial but did not file a notice of appeal or take any steps toward perfecting an appeal (R. 3, 11). In his 1955 motion for leave to file a petition for habeas corpus in this Court, *Hill* v. *United States*, No. 373 Misc., October Term 1955, denied, 350 U.S. 946 (1956), petitioner alleged that his trial attorneys refused to appeal because they said they were court-appointed counsel and could not give free time to petitioner's case.

sentencing court, the Eastern District of Tennessee[2] (R. 26-33). This motion, filed by the petitioner *pro se*, alleged several grounds for relief, but in view of this Court's limited grant of certiorari the one now important was the contention

> " . . . that he was denied the right under Rule 32(a) of the Federal Rules of Criminal Procedure, Title 18 U.S.C. to have the opportunity to make a statement in his own behalf and to present any information in mitigation of punishment. . . . The Transcript page 8 shows that Judge Darr did not comply with the mandatory provision of Rule 32(a) on June 4, 1954 and that further Judge Darr in prejudicial misconduct signed the Judgment and Commitment papers as complying with Rule 32(a) when in fact he did not do so" (R. 27).

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[2] This was the fourth such motion filed by petitioner. His first motion, filed October 18, 1954 (R. 3, 11), a few months after his trial, was denied nine days later (R. 3). The Court of Appeals affirmed. *Hill* v. *United States*, 223 F.2d 699 (6th Cir. 1955) (R. 4, 12), cert. denied, 350 U.S. 867 (1955). Petitioner next filed a motion for leave to file a petition for writ of habeas corpus in this Court on November 17, 1955. No. 373 Misc., October Term 1955. This motion was denied. *Hill* v. *United States*, 350 U.S. 946 (1956). On March 15, 1956, petitioner filed his second motion under §2255 in the trial court (R. 4, 12). This was denied six days later (R. 4, 12), and the Court of Appeals affirmed. *Hill* v. *United States*, 238 F.2d 84 (6th Cir. 1956) (R. 4, 12), cert. denied, 352 U.S. 1007 (1957). Petitioner's third motion to vacate sentence was filed on December 19, 1957 (R. 5, 12). The District Court denied the motion on January 10, 1958 (R. 5, 12). On appeal, the Court of Appeals remanded for a hearing. *Hill* v. *United States*, 256 F.2d 957 (6th Cir. 1958) (R. 5, 13). Thereupon, petitioner filed an affidavit of prejudice on July 21, 1958 (Document 38 of the unprinted record; see note 3, *infra*), and Judge Leslie R. Darr, who had presided at the trial and all prior proceedings in the District Court, recused himself. After the United States had filed a Response (R. 5, 13), a hearing was held before Judge Robert Taylor on September 10 and 11, 1958 (R. 6, 13-14). From Judge Taylor's denial of his motion, petitioner appealed; the Court of Appeals affirmed. *Hill* v. *United States*, 268 F.2d 203 (6th Cir. 1959) (R. 7, 15), cert. denied, 361 U.S. 854 (1959).

The United States filed a Response to this motion on January 7, 1960 (R. 34-40). Nothing in the response was addressed specifically to petitioner's contention of a violation of Rule 32(a). The only portion conceivably relevant was this general assertion:

> "It would appear that all of the questions which petitioner could raise in a proceeding under Section 2255, Title 28 U.S.C., have been previously determined, and it being well settled that such a proceeding cannot be used as a substitute for an appeal" (R. 35).

One week later, without having held a hearing, the District Court denied the motion (R. 44). In a Memorandum accompanying the Order (R. 41-43), the District Court did not deal with the contention of a violation of Rule 32(a) directly. This issue was disposed of as follows:

> "The other questions made by petitioner in the present petition were made in the petition upon which the Court passed in the September 1958 hearing and found to be lacking in merit" (R. 42-43).

The September 1958 proceeding referred to an earlier motion by this petitioner for relief under §2255. Instituted on December 19, 1957 (R. 3), this motion had alleged the violation of Rule 32(a) among other errors. (Document No. 32 in unprinted record.)[3] In that proceeding, the United States filed a response on August 27, 1958, in part as follows:

> "Respondent denies the truth of petitioner's allegation No. 2, and contrary to the allegation respondent avers that at the time of the imposition of the sen-

[3] By a stipulation of counsel, dated May 9, 1961, now in the files of this case, it was agreed that the parties may refer to the full record on file in this Court, including any part thereof which has not been printed.

> tences the District Judge specifically inquired of the petitioner whether or not he had anything to say before sentence was imposed and that the petitioner replied that he had nothing to say." (Document No. 40 in unprinted record.)[3]

This direct clash of factual assertions was never resolved. While a hearing was held, it was limited to petitioner's contention that he had been denied the right to give notice of an appeal from his 1954 conviction. The District Court disposed of the Rule 32(a) contention, along with other claims, on the ground that "such alleged errors cannot be corrected in a proceeding under Title 28, U.S.C. 2255" (R. 23, 43).

Thus, when the District Court, in the present proceeding, denied the motion upon the ground that the contention under Rule 32(a) had been found to be "lacking in merit" earlier, the Court was simply reaffirming its 1958 decision that the claim could not be advanced in a §2255 proceeding. The Court of Appeals for the Sixth Circuit, in a brief *per curiam* order, affirmed on the opinion of the District Judge (R. 45).

Despite the unqualified assertion of the United States in its response to the 1958 motion, it is clear beyond any question that petitioner was sentenced in violation of Rule 32(a). The transcript of Charles M. Fain, the Official Court Reporter, shows that, when the case was called for judgment on June 4, 1954, there was no interchange whatsoever between the Court and the defendant, or his counsel.[4] The following is the complete record of what transpired:

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[3] See preceding page for footnote 3.

[4] To eliminate any possible confusion, it must be noted that the Solicitor General's Memorandum, in response to the petition for certiorari in the present proceeding, asserted that there is no transcript of the imposition of sentence in this case. U.S. Memorandum,

"The Court: Does the Government care to say anything?

"Gen'l Davis: The Government does not care to make any statement, your Honor. I think it has been developed in the proof, the character of this defendant and the other crimes which he has committed.

"The Court: I believe the other co-defendant, the adult got seventeen years?

"Gen'l Davis: He received fifteen years on the kidnapping and two years on the Dyer Act. The minor boy received five years in the kidnapping charge and one year and one day on the Dyer Act charge.

"The Court: That is the way I remembered it" (R. 18).

The Court then proceeded to announce his reasons for sentence and the sentence itself. At no point did he ask the defendant whether he wanted to make a statement in his own behalf. At no point did he ask the defendant if he wished to present any information in mitigation of punishment. Nor did he make any such inquiries of counsel for the defendant. Thus, on the face of the record, there is a manifest violation of Rule 32(a).[5]

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p. 3. It was noted that, in March 1958, the District Court had refused petitioner's request for a transcript noting that there was none in existence and that none could be prepared because of the death of the court reporter. The Government was apparently unaware of the fact that, in accordance with 28 U.S.C. §753 which requires without exception that court reporters "shall . . . transcribe and certify all pleas and all proceedings in connection with the imposition of sentence in criminal cases," there was a full transcript of the imposition of sentence in the records of this case then in the possession of the Clerk of the Court of Appeals for the Sixth Circuit. The petitioner himself had referred to this transcript in his motion, *supra*, correctly citing page 8 as the beginning of the sentencing proceedings.

[5] It is relevant, perhaps, to note that the present petition is not the first to rely upon the violation of Rule 32(a). The record shows this issue was also raised in the 1957 motion to vacate sentence. In

ARGUMENT

I

The District Court Clearly Violated the Mandatory Requirements of Rule 32(a) of the Federal Rules of Criminal Procedure by Failing to Provide Petitioner With an Opportunity to Make a Statement in His Own Behalf and to Present Any Information in Mitigation of Punishment.

Rule 32(a) of the Federal Rules of Criminal Procedure, so far as pertinent here, provides:

> "Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment."

It is clear beyond argument that this Rule was breached in the imposition of sentence upon petitioner.

The decision of this Court last Term in *Green* v. *United States*, 365 U.S. 301 (1961), disposes of any doubts as to the meaning of Rule 32(a). Mr. Justice Frankfurter, speaking for himself and Mr. Justices Clark, Harlan and Whittaker, wrote:

> "The design of Rule 32(a) did not begin with its promulgation; its legal provenance was the common-

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his motion for leave to file a petition for writ of habeas corpus, filed in this Court on November 17, 1955, No. 373 Misc., October Term 1955, petitioner alleged that the trial court did not ask him if he had anything to say before sentence was imposed. *Hill* v. *United States*, 350 U.S. 946 (1956). The contention also appears in the affidavit of prejudice filed July 21, 1958 (Document 38 in unprinted record). With due allowance for the fact that petitioner was compelled by the circumstances to draft his own motions and petitions without the assistance of counsel, there is no indication of any lack of diligence or perseverance in the manner of his pressing his claim. And see note 1 *supra*.

law right of allocution. As early as 1689, it was recognized that the court's failure to ask the defendant if he had anything to say before sentence was imposed required reversal. See Anonymous, 3 Mod. 265, 266, 87 Eng. Rep. 175 (K.B.). Taken in the context of its history, there can be little doubt that the drafters of Rule 32(a) intended that the defendant be personally afforded the opportunity to speak before imposition of sentence." *Id.* at 304.

The Chief Justice, and Mr. Justices Douglas and Brennan joined in an opinion by Mr. Justice Black, who said:

"I agree that Federal Criminal Rule 32(a) makes it mandatory for a federal judge before imposing sentence to afford every convicted defendant an opportunity to make, in person and not merely through counsel, a statement in his own behalf presenting any information he wishes in mitigation of punishment . . . ." *Id.* at 307.

Only Mr. Justice Stewart had any reservations that Rule 32(a) clearly required a district judge in every case to volunteer to the defendant an opportunity personally to make a statement, when the defendant has a lawyer at his side who speaks fully on his behalf. But Mr. Justice Stewart agreed that it would be better practice to allow the defendant to speak for himself, in addition to anything that his lawyer might say. He would have announced such a rule for prospective operation. *Id.* at 306.

While the Court was substantially unanimous on the interpretation of Rule 32(a) in the *Green* case, it divided sharply on a factual question, and the judgment of the Court affirmed denial of relief. Four Justices held, in the opinion of Mr. Justice Frankfurter, that an ambiguous

inquiry from the bench prior to sentence may well have been addressed to the defendant rather than to his counsel and, accordingly, the defendant failed to meet his burden of proof. This view of the factual question, coupled with Mr. Justice Stewart's conclusion that legally the rule should operate prospectively in this situation, resulted in an affirmance.

In the present case, however, the violation of Rule 32(a) is clear and unequivocal on the face of the record. The District Court did not ask anyone other than counsel for the Government to speak prior to imposition of sentence (R. 18). Counsel for the defendant, while present, was not invited to speak and did not say a word. The doubt which troubled Mr. Justice Stewart, concerning the meaning of Rule 32(a) "when the defendant has a lawyer at his side who speaks fully on his behalf," is not raised in this case. Nor is there any room for factual disagreement in the interpretation of the District Court's actions. There was no opportunity given to the defendant or to his counsel to make a statement in behalf of the defendant or to present information in mitigation of punishment. *Cf. Taylor* v. *United States*, 285 F.2d 703 (9th Cir. 1960).

II

Petitioner Is Entitled to Relief From This Violation of Rule 32(a) in a Proceeding for Correction of Sentence Under Rule 35 of the Federal Rules of Criminal Procedure.

The conclusion that there has been an indubitable violation of Rule 32(a) brings us to the question which was expressly left open in the opinion of Mr. Justice Frankfurter in *Green* v. *United States*, *supra*. That is, accepting the fact of a violation of the Criminal Rules, what, if any, relief is available to redress the wrong which has occurred?

Petitioner submits, first, that he is entitled to relief from the illegal sentence under Rule 35 of the Federal Rules of Criminal Procedure.

Preliminarily, it may be noted that the order of this Court granting the petition for certiorari expressly limited the cause to "the question of whether petitioner may raise his claim under Federal Criminal Rule 32(a) in the proceeding which he has now brought" (R. 46). As has been set out, petitioner instituted the present proceeding by a motion to vacate sentences, clearly labelled as based upon 28 U.S.C. §2255 (R. 26). However, there is substantial authority permitting cases originally instituted under §2255 to be treated as arising under Rule 35 where it is or may be advantageous to the prisoner to do so. *Heflin* v. *United States*, 358 U.S. 415 (1959); *Bayless* v. *United States*, 288 F.2d 794 (9th Cir. 1961); *Baker* v. *United States*, 271 F.2d 190 (8th Cir. 1959); *May* v. *United States*, 261 F.2d 629 (9th Cir. 1958), cert. denied, 359 U.S. 994 (1959); *Duggins* v. *United States*, 240 F.2d 479 (6th Cir. 1957); *United States* v. *Bradford*, 194 F.2d 197 (2d Cir. 1952), cert. denied, 343 U.S. 979 (1952); *United States* v. *Hough*, 157 F. Supp. 771 (S.D. Cal. 1957). It seems appropriate to treat this Court's phrase "the proceeding which he has now brought," to mean a proceeding seeking post-sentence relief either under §2255 or Rule 35.

The four Justices who joined the opinion of Mr. Justice Black in the *Green* case stated no reservations as to the availability of relief under Rule 35 of the Rules of Criminal Procedure. The only pertinent part of that rule is the first sentence: "The court may correct an illegal sentence at any time." These four Justices concluded that a sentence imposed in violation of Rule 32(a) is an illegal sentence. Mr. Justice Frankfurter's opinion, finding no violation of Rule 32(a), concluded: "we therefore find that his

sentence was not illegal." 365 U.S. at 305. This opinion, however, rested on the assumption, stated at the outset, "that this inadequacy in the circumstances now before us would constitute an error *per se* rendering the sentence illegal." *Id.* at 303.

A. Rule 35 Provides a Remedy for Illegality, Not Only in the Content of the Sentence, But Also in the Procedure Whereby Sentence Is Imposed.

The question thus presented is the scope of Rule 35, i.e., the meaning of "illegal sentence." Not surprisingly, most of the cases have dealt with the length of the sentence imposed. *E.g., Callanan* v. *United States*, 364 U.S. 587 (1961); *Heflin* v. *United States*, 358 U.S. 415 (1959); *Prince* v. *United States*, 352 U.S. 322 (1957); *Smith* v. *United States*, 287 F.2d 270 (9th Cir. 1961); *United States* v. *Drake*, 250 F.2d 216 (7th Cir. 1957); *Duggins* v. *United States*, 240 F.2d 479 (6th Cir. 1957); *Ekberg* v. *United States*, 167 F.2d 380 (1st Cir. 1948). In most of these cases, the illegality was a sentence which exceeded the authorized statutory maximum because consecutive sentences had been imposed on multiple counts whereas only one offense had been committed.

By no means can it be said, however, that a sentence is illegal only if it exceeds in content the statutory maximum set down by Congress. In one of the first cases decided under Rule 35, *Simunov* v. *United States*, 162 F.2d 314 (6th Cir. 1947) the Court of Appeals for the Sixth Circuit granted relief to a prisoner, whose sentence was clearly within the limits set by the legislature, because the District Court had been ambiguous in stating the sentences on several counts. One of the charges, kidnapping connected with the perpetration of a bank robbery, would have supported the total sentence. The Sixth Circuit reduced the

sentence from sixty-five to twenty-five years because the sentencing judge had left it unclear whether he intended to impose more than twenty-five years for the kidnapping charge. The source of the illegality was the ambiguous manner in which the sentence had been announced.

There have been other instances in which a sentence has been held illegal, or a charge of illegality entertained under Rule 35, where the defect has come in the procedure at the sentencing proceeding. In one of the most authoritative court of appeals opinions on Rule 35, *Cook* v. *United States*, 171 F.2d 567 (1st Cir. 1948), cert. denied, 336 U.S. 926 (1949), a sentence was imposed in the absence of the defendant. This, of course, violated Rule 43 of the Rules of Criminal Procedure, which provides that "the defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules." This error occurred when the district court discovered that, in originally imposing sentence, it had failed to impose a mandatory fine as well as imprisonment. Belated efforts to correct that error led to a sentence in the absence of the defendant. It was agreed on all sides that such a sentence was illegal and could be corrected. See also *Gilliam* v. *United States*, 269 F.2d 770 (D.C. Cir. 1959).

The Seventh Circuit recently entertained a Rule 35 motion where the illegality in the sentence was said to arise from failure of the district court to comply with Rule 32(c), which requires a presentence report before the imposition of sentence. *Garfinkel* v. *United States*, 285 F.2d 548 (7th Cir. 1960), cert. denied, 365 U.S. 879 (1961).

In 1947, the Eighth Circuit had before it a contention that a judgment and sentence were invalid because the defendant had been insane at the time of trial and sentencing.

Byrd v. *Pescor*, 163 F.2d 775 (8th Cir. 1947), cert. denied, 333 U.S. 846 (1948). The prisoner sought relief by writ of habeas corpus. The Court of Appeals held that habeas corpus was an inappropriate remedy unless and until relief was sought under Rule 35, which was available to vacate or correct a sentence because of such illegality. See also *D'Ostroph* v. *Pescor*, 7 F.R.D. 569 (W.D. Mo. 1947), appeal dismissed, 173 F.2d 897 (8th Cir. 1949), cert. denied, 337 U.S. 926 (1949); *Brown* v. *Pescor*, 74 F. Supp. 549 (W.D. Mo. 1947). While the irregularity in these cases is not governed by a specific rule in the Rules of Criminal Procedure, they are instances of the application of Rule 35 to a defect in the manner of imposition of sentence rather than in the sentence *per se*.[6]

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[6] Indeed there have been some courts which have employed Rule 35 in cases which challenged proceedings going to the propriety of the convictions rather than merely the sentences. The *Byrd* case, *supra*, in part raises the matter of insanity at the trial as well as sentencing. In *Griffin* v. *United States*, 173 F.2d 909 (6th Cir. 1949), the Sixth Circuit granted relief under Rule 35 to a prisoner whose primary contention was that his indictment was insufficient for failing to allege that his violation had been "knowingly" committed. While the Court of Appeals on rehearing seemed to merge and confuse the remedies under §2255 and Rule 35, 175 F.2d 192 (6th Cir. 1949), several years later the same court declared that its decision in *Griffin* had rested solely on Rule 35. *Duggins* v. *United States*, 240 F.2d 479, 483 (6th Cir. 1957). See also *United States* v. *Thompson*, 261 F.2d 809 (2d Cir. 1958), cert. denied, 359 U.S. 967 (1959), where the Second Circuit reviewed the sufficiency of the evidence to support a conviction in light of a recent decision by this Court which sharpened and refined the definition of summary contempt. The court said that ". . . it seems clear that the motion is broadly available to correct an injustice in a conviction or sentence." *Id.* at 810. But the more orthodox view is that of Judge Calvert Magruder, who said that a Rule 35 motion presupposes a valid conviction. *Cook* v. *United States*, 171 F.2d 567, 570 (1st Cir. 1948), cert. denied, 336 U.S. 926 (1949). See also *United States* v. *Morgan*, 346 U.S. 502, 506 (1954); *Duggins* v. *United States*, 240 F.2d 479, 483 (6th Cir. 1957); *Fooshee* v. *United States*, 203 F.2d 247, 248 (5th Cir. 1953); *In re Shepherd*, 195 F.2d 157, 158 (1st Cir. 1952). *Cf. Baker* v. *United States*, 271 F.2d 190, 192 (8th Cir. 1959); compare *Montos* v. *United States*, 261 F.2d 39 (7th Cir. 1958); *Corcoran* v. *United States*, 231 F.2d 449, 451 (7th Cir. 1957).

B. The History of Rule 35 of the Rules of Criminal Procedure Is Consistent With Its Use to Correct Sentences Which Are Illegal Because of the Manner in Which They Are Imposed.

Rule 35 was among the group of Rules, Nos. 32 through 39, which were promulgated by this Court on February 8, 1946, their effective date to coincide with the effective date of the remainder of the Rules of Criminal Procedure. These eight rules rested upon an earlier authorization of rule-making power from Congress, 47 Stat. 904 (1933), as amended by 48 Stat. 399 (1934), and superseded the Criminal Appeals Rules first issued by this Court on May 7, 1934. See 292 U.S. 661. There was, however, no express provision in the Criminal Appeals Rules of 1934 comparable to the first sentence of Rule 35. The text of the rule, as such, dates only from 1946.

Professor George H. Dession, a member of this Court's Advisory Committee on Criminal Rules, described the background of the rule in 1946 in these terms:

> "Rule 35 is new so far as an express rule goes. It deals with correction of error and reduction of sentence. Now of course a court had the power before to correct an illegal sentence at any time, and sentence could pretty clearly be reduced during the term, but this rule expressly states that an illegal sentence may be corrected at any time . . . ." Proceedings of the New York University School of Law Institute on the Federal Rules of Criminal Procedure, February 15 and 16, 1946, at 207.

The Note of the Advisory Committee, published with the Rules, declares that: "The first sentence of the rule continues existing law."

Nowhere does there appear an official statement by the Advisory Committee as to what elements of existing law were continued. As the distinguished Chairman of the Advisory Committee, Arthur T. Vanderbilt, noted, speaking of the period prior to 1946, "our Federal criminal procedure has been chaotic," but he said that the new Criminal Rules "reduce to a workable compass what was a perfect wilderness of precedent before the Rules were drafted." Proceedings of the Catholic University of America School of Law Institute on the Federal Rules of Criminal Procedure, Washington, D. C., Oct. 16, 1945, 5 F.R.D. 88, 94.

There was considerable confusion in the lower federal courts on the scope of their power to deal with sentences after the conclusion of the term of court at which sentences were imposed. Under the influence of *United States* v. *Mayer*, 235 U.S. 55 (1914); *Phillips* v. *Negley*, 117 U.S. 665 (1886); *Bronson* v. *Schulten*, 14 Otto 410, 104 U.S. 410 (1882); and *Pickett's Heirs* v. *Legerwood*, 7 Pet. 147 (1833), it was widely believed that the only relief available after the term had ended was through habeas corpus, and that writ did not lie in the court imposing sentence. The term principle was strongly reinforced, with regard to the power of the trial court to grant a motion for new trial, in *United States* v. *Smith*, 331 U.S. 469 (1947). Eventually, in 1954, this Court held squarely for the first time that relief in the nature of the common-law writ of error coram nobis, a remedy in the sentencing court, was available in a criminal case in the federal courts. *United States* v. *Morgan*, 346 U.S. 502 (1954).

The principal case widening the power of the sentencing court to correct errors after the term had passed was *Holiday* v. *Johnston*, 313 U.S. 342 (1941). The case had been instituted by a prisoner seeking habeas corpus in the district court in the district where he was confined. One of his

contentions challenged the validity of a consecutive sentence which he had not yet begun to serve. On familiar principles of habeas corpus, he was not entitled to seek relief under the Great Writ. *McNally* v. *Hill*, 293 U.S. 131 (1934). Denying a remedy, this Court stated that the prisoner's proper remedy was an application to the sentencing court for vacation of the sentence and a resentence in conformity with the statute. 313 U.S. at 349. In due course, such a motion was granted. *Holiday* v. *United States*, 130 F.2d 988 (8th Cir. 1942).

An additional influential case in the advent of a motion-type remedy in the same period was this Court's decision in *Steffler* v. *United States*, 319 U.S. 38 (1943). Steffler contended that the indictment did not state an offense against the United States and that he had been denied assistance of counsel at the trial. Holding that an *in forma pauperis* appeal was proper from denial of a motion to set aside judgment of conviction, the Court implied that this type of remedy would lie for such errors at the original trial.

In the lower courts, most of the developments of a motion-type remedy in the sentencing court took place in the early 1940's as a result of the *Holiday* and *Steffler* cases. This trend was given further impetus by the publication of two preliminary drafts of the Advisory Committee on the Criminal Rules. The first of these, in 1943, had the predecessor of Rule 35 as Rule 31(b), which provided that "the court may correct an illegal sentence at any time." The Committee's Note declared that this sentence "states the present law," citing 5 Longsdorf, Cyclopedia of Federal Procedure (1929) §2468. In the Second Preliminary Draft, published in 1944, the same provision was placed in Rule 37, with an identical Committee Note of explanation. Lower courts were thus advised, on persuasive authority, that they possessed the power to correct errors in sentence at any time.

In the brief span of years prior to the effective date of the Criminal Rules, there was a spate of litigation in something like this form of procedure. Of course, relief was made available when a sentence, through consecutive terms on multiple counts for essentially one offense, resulted in an aggregate prison sentence which exceeded the statutory maximum for the single offense. See, e.g., *Coy* v. *United States*, 156 F.2d 293 (6th Cir. 1946), cert. denied, 328 U.S. 841 (1946) (motion to set aside judgment); *Rutkowski* v. *United States*, 149 F.2d 481 (6th Cir. 1945) (motion to vacate sentence); *Miller* v. *United States*, 147 F.2d 372 (2d Cir. 1945) (motion to correct sentence); *Wilson* v. *United States*, 145 F.2d 734 (9th Cir. 1944) (motion to vacate judgment); *Robinson* v. *United States*, 143 F.2d 276 (10th Cir. 1944) (motion to vacate judgment); *Meyers* v. *United States*, 116 F.2d 601 (5th Cir. 1940) (motion for resentence).

At the same time, there was a clear trend toward providing a remedy in the trial court for errors in the sentencing procedure.

In *Peterson* v. *United States*, 39 F.2d 336 (8th Cir. 1930), a prisoner sought relief by writ of error coram nobis on the ground, *inter alia*, that he had been intoxicated at the time of imposition of sentence. The trial court found against the prisoner on the facts and the Court of Appeals affirmed. In *Batson* v. *United States*, 137 F.2d 288 (10th Cir. 1943), a prisoner filed a motion to correct sentence because his counsel had not been present at the time of sentencing. The Tenth Circuit held that the defendant had waived any right he may have had to have counsel present through his failure to protest the absence when asked if he had anything to say.

In *Nivens* v. *United States*, 139 F.2d 226 (5th Cir. 1943), cert. denied, 321 U.S. 787 (1944), rehearing denied, 321 U.S.

804 (1944), the court entertained a motion to correct sentence which asserted that the prisoner had been sentenced on several counts, which had not expressly been announced as consecutive. The prisoner sought to have the sentences treated as concurrent. The contention was denied on the merits, the court holding that the expiration of the term of court at which sentence was imposed does not deprive the court of the power to correct the record to conform to the truth. See also *Buie* v. *United States*, 127 F.2d 367 (5th Cir. 1942), cert. denied, 317 U.S. 689 (1942), rehearing granted, 317 U.S. 703 (1943), cert. denied, 318 U.S. 766 (1943). Compare *Downey* v. *United States*, 91 F.2d 223 (D.C. Cir. 1937).

In *Carrollo* v. *United States*, 141 F.2d 997 (8th Cir. 1944), a motion to vacate sentence challenged the legality of a sentence for income tax evasion which imposed a prison term of three years with a proviso that, if the defendant paid taxes owed before the end of the court's term, the sentence would be modified to one year in prison. The motion asserted that this was a void contingency, but the contention was denied on the merits.

A trend was clearly discernible toward the fashioning of a remedy in the sentencing court for errors not only in the substance of the sentence but also in the procedure of the sentencing as well.

C. Sound Policy in the Administration of Criminal Law Supports Providing Relief Where a Sentence Has Been Imposed in Violation of Rule 32(a).

Compared with the procedural safeguards provided to a criminal defendant prior to his trial and conviction, there are relatively few requirements with respect to the proper manner for imposing sentence. Yet for a great many defendants, the only important facet of their prosecution is the nature and extent of the sentence they will receive. The

right of allocution was a fundamental right at common law. As this Court agreed unanimously in the *Green* case last Term, it is a basic right today. Mr. Justice Frankfurter noted that "the most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." 365 U.S. at 304.

The importance of the right of allocution is underscored in a case like the present one, where the defendant had several previous convictions which were presumably known to the court. This prior record, for the most part compiled in the state courts of Florida, could be explained and mitigated. Petitioner has been and is presently seeking collateral relief from those judgments and, indeed, has already had one set aside. This mitigating evidence, if known to the sentencing court, might have a profound impact upon the sentence imposed.

At the same time, the correction of sentencing errors does not interfere with the primary societal interest in the administration of its criminal laws. The relief asked does not invalidate the underlying conviction. It would never be necessary for the United States to mount a new prosecution, with all the incumbent difficulties of marshalling evidence some time after the event. The sole cost involved is the time of the court in reconsidering sentence and imposing a legal sentence, together with the custodial inconvenience involved in returning a prisoner to the court for resentence. Such matters are trivial in comparison with the basic rights sought to be vindicated on behalf of the prisoner serving an illegal sentence.

III

Petitioner Is, in Any Event, Entitled to Relief From the Illegal Sentence Under 28 U.S.C. §2255.

If this Court should conclude that Rule 35 is not the appropriate remedy for a violation of Rule 32(a), petitioner is nevertheless entitled to relief under 28 U.S.C. §2255. For this argument, petitioner incorporates by reference the argument of the Brief for Petitioner in *Machibroda* v. *United States*, No. 69, October Term 1961.

Conclusion

For the foregoing reasons it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

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Counsel for Petitioner

August 24, 1961

Certificate of Service

I certify that I have served a copy of this Brief for Petitioner upon the Solicitor General of the United States by depositing the same in a United States post office, with first class postage prepaid, addressed to the Solicitor General, Department of Justice, Washington, D. C.

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August 24, 1961